No. 76-1555

IN THE

Supreme Court of the United States

October Term, 1976

BASIN, INC., *Petitioner*

vs.

FEDERAL ENERGY ADMINISTRATION, *Respondent*

Appendix to Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals

CECIL E. MUNN
1800 First National Bank Building
Fort Worth, Texas 76102

NORTHCUTT ELY
Watergate Six Hundred Building
Washington, D.C. 20037

May 9, 1977

[illegible]

APPENDIX INDEX

Page

BASIN, INC., Plaintiff-Appellant,

v.

FEDERAL ENERGY ADMINISTRATION and Frank Zarb, Individually and as Administrator of the Federal Energy Administration, Defendants-Appellees.

No. 5—14.

Temporary Emergency Court of Appeals.

Decided April 6, 1976.

As Amended April 12, 1976.

[534 F.2d 324]

HASTIE, Judge.

In the district court, Basin, Inc. sued Federal Energy Administration (FEA) to enjoin the enforcement of section 211.63 of the agency's regulations. Adopted in January, 1974, that section was the so-called "December 1 rule" that regulated the allocation of old domestic crude oil by freezing supplier-purchaser relations as they existed December 1, 1973.[1]

---

[1] "§ 211.63 Supplier/purchaser relationships.

"(a) All supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973, shall remain in effect for the duration of this program, except purchases and sales made to comply with this program: *Provided, however,* That (1) any such supplier/purchaser relationship may be terminated by the mutual consent of both parties; (2) the provisions of this paragraph do not apply to the first sale of crude oil pursuant to § 210.32 of this chapter; and (3) the provisions of this paragraph shall not apply to the seller of any new crude petroleum or released crude petroleum, as defined in Part 212, if the present purchaser of such crude petroleum refuses, after notice by the seller, to meet any bona fide offer made by another purchaser to buy such crude petroleum at a lawful price above the price paid by the present purchaser." 10 C.F.R. (1975) § 211.63(a).

At a hearing on a motion for preliminary injunction, it appeared that Basin is a marketer of crude oil. A major part of a marketer's business is buying crude oil from producers and reselling it to refiners,[2] although most domestic crude oil is sold by the producer directly to a refiner. On December 1, 1973, Basin had been in business only two months. Before the freeze date it had obtained only small deliveries of crude oil under contracts with a few suppliers, and it was negotiating with others for additional quantities of oil.

For a year or more, Basin complained without avail to FEA that section 211.63 operated unjustly in precluding it from establishing adequate sources of supply for its new enterprise. Then, on August 31, 1975, the regulations expired with the emergency legislation under which they had been issued.

Within a few weeks Basin contracted for and began to receive old crude oil from several new suppliers. But on September 29, 1975, the Emergency Petroleum Allocation Act of 1975, P.L. 94—99, became law. That statute reinstated the lapsed regulations, among them section 211.63, retroactive to their August 31 expiration date. For the purposes of this case, the effect of this was to invalidate all sales after September 9, 1975 to Basin from its new suppliers.

This led to the present suit and to the motion for a preliminary injunction that would allow Basin to receive oil under the September, 1975, purchase agreements until final disposition of this suit. On October 6,

[2]In its complaint, Basin alleges that marketers also provide other "valuable crude oil marketing services to crude oil producers. . . ."

1975, the district court granted the requested preliminary injunction, and FEA appealed. Thereafter, on motion by FEA, we stayed the preliminary injunction pending our final disposition of the appeal.

Essential to the preliminary injunction was the district court's conclusion that a substantial doubt existed whether the legislative reinstatement of § 211.63 could lawfully restrict future sales under contracts entered into before September 29. However, in *Condor Operating Co. v. Sawhill*, Em.App.1975, 514 F.2d 351, *cert. denied*, 421 U.S. 976, 95 S.Ct. 1975, 44 L.Ed.2d 467, we rejected a contention that section 211.63 as originally promulgated could not validly preclude future sales under pre-existing contracts. By the same token, sales made after the Allocation Act of September 29, 1975, are not beyond the reach of that legislation merely because they occur in performance of agreements entered into before September 29.[3]

But the posture of this controversy has been changed by significant events that have occurred since October, 1975. Effective November 18, 1975, FEA has revised § 211.63, prefacing the amendment with an explanatory statement. 40 F.R. 54422, November 24, 1975. It is explained that the amendment permits "the substitution of new resellers [marketers] of crude oil for present resellers,[4] provided certain conditions designed to protect the ultimate refiner of the crude oil were met". Moreover, in the explanatory statement

[3]We express no opinion about the validity of sales completed between September 1 and September 29.

[4]We are told that about 10 per cent of the domestic crude oil supply is handled by marketers.

it is explicitly recognized that in practical operation, the December 1 rule "has necessarily lessened the opportunity for competition in the marketing of crude oil and has effectively prevented new entrants from having significant access to price-controlled oil". As a corrective of this harsh consequence, the revised section 211.63(a) now permits a reseller to buy from a producer a quantity of crude oil that the producer has been selling to another reseller, but only if the refiner to whom the former marketer was selling the oil shall consent to this marketing change. Finally, in thus requiring the refiner's consent, FEA stated that it had considered and rejected an alternative that would require merely that the new marketer offer the oil to the refiner on terms no less favorable than the refiner's arrangements with the preceding marketer. *Id.*

Basin has strongly represented to us that the relationships, pressures and economic interests in the oil industry are such as to make this formal broadening of its access to producers practically meaningless. **We view this issue as involving relevant questions of fact** concerning Basin's present supply and its allegedly futile efforts to enlarge its supply that can most appropriately be resolved through an evidentiary hearing in the district court.

A more recent change in section 211.63 became effective, subject to review after 90 days, on February 12, 1976, in connection with the imposition of price controls on all, not merely old, domestic crude oil. 41 F.R. 7386, 7387, February 18, 1976. The freeze date for supplier-purchaser relations was changed from December 1, 1973, to January 1, 1976. But any member of the industry was declared eligible to become the purchaser in a first sale of domestic crude from a new oil producing property. Beyond that, as originally proposed by FEA in its notice of intended rule making, the new rule would have created similar open competition for oil produced from an old property in excess of that property's January 1, 1976, production level. However, the rule subsequently adopted did not contain this provision. Rather, it expressly restricted access to this increase to purchasers who were buying the output of the property on January 1, 1976. 41 F.R. 7387. With this rule FEA published an explanatory statement that justified the agency's change of position and rejection of the open competition it had proposed by stating that it had acted because "most firms commenting were of the opinion that . . . [the original proposal] would cause severe administrative difficulties in many cases". *We are reluctant to believe that this means that severe administrative burdens on the the federal regulatory agency are offered as a justification for eliminating competition* for oil in excess of former production. On the other hand, *it is difficult to believe that the administrative burdens a willing seller would bear are a reason for not allowing him to sell.* In any event, FEA has had no opportunity to justify to a court this removal of all increase in production from competition among prospective buyers. This too merits original consideration at a hearing in the district court.

Finally, it appears that, pursuant to the mandate of section 454 of the Energy Policy and Conservation

Act, Pub.L. 94—163, 89 Stat. 871, FEA is even now reevaluating its regulations. And one of the indicated motivating concerns that led Congress to require this reevaluation was the problem of opportunity for "crude oil purchasers and resellers who initiated business after the 1972 base period . . . to compete with others for the purchase of crude oil from producers . . . ." S.Conf.Rep.No.94—516, 94th Cong., 1st Sess., at 202, *U.S.Code Cong. and Adm.News*, 94th Cong., 1st Sess. (1975), p. 2043.

In sum, it appears that both FEA and Congress have recognized the disadvantaged position of newcomers like Basin under the crude oil allocation regulations. Beyond that, FEA has properly indicated that, in determining what corrective measures are warranted, this disadvantage must be weighed against the need to protect refiners from deprivation of their established crude oil supplies. But *it is far from clear that the measures taken by FEA to ameliorate the plight of recent comers to the industry are of substantial practical value* or that no reasonable and more effective measures can be taken without imposing unwarranted deprivations upon some refiners. **Certainly, any governmental action that will effectively eliminate relatively recent comers from an industry calls for critical scrutiny and can be justified only by a clear showing of compelling circumstances.**

Because of the changed posture of this controversy, we shall vacate the preliminary injunction and remand the cause to the district court for further consideration consistent with this opinion. If necessary to

put in issue the effect and to challenge the reasonableness of the present provisions of section 211.63, the plaintiff shall be permitted to amend the allegations and prayers of its complaint. We believe *an expedited hearing would be appropriate in order to enable the district court to determine promptly the relevant facts* and whether FEA has unreasonably denied administrative relief that can properly be afforded the plaintiff without unwarranted sacrifice of other legitimate interests and public concerns.

It is so ordered. Our mandate shall issue forthwith.

Basin, Inc. v. Federal Energy Administration, et al., U. S. District Court for the Western District of Texas, San Antonio Division, Dkt. No. SA-75-CA-250, October 22, 1976.

[4 CCH, Energy Management ¶26,063]

SUTTLE, Judge.

This action has been brought by Basin, Inc., (Basin) to seek judicial review of the supplier/purchaser freeze rule, 10 C. F. R. § 211.63, 41 F. R. 24338 at 24340-41 (June 16, 1976). The action came on for trial before the Court October 13-21, 1976. The Court finds generally in favor of the Plaintiff and against the Defendants, and makes the following findings of fact and conclusions of law, pursuant to Rule 52(a) of the Federal Rules of Civil Procedure.

Findings of Fact.

1. The Plaintiff, Basin, is a corporation organized under the laws of the State of Texas with its offices and principal place of business in the City of Midland, Midland County, Texas. It is a relatively recent comer to the crude oil marketing industry, having been organized in October of 1973 to engage in the crude oil marketing industry.

2. Basin and its principal stockholder on its behalf made substantial investments and incurred substantial expense in contemplation of conducting a crude oil marketing business.

3. **By December 1, 1973, Basin had commitments from producers to sell to Basin approximately 1,000,000 barrels of crude oil per month,** but deliveries had begun by that date from only approximately 25% of those commitments.

4. The Defendant Federal Energy Administration (FEA) is an agency of the United States. The Defendant Frank Zarb is an employee of the United States acting at all times in his official capacity as Administrator of the Federal Energy Administration.

5. On November 27, 1973, the Emergency Petroleum Allocation Act of 1973, 15 U. S. C. §751 *et seq.*, became law. Section 753(a) directed the President to "promulgate a regulation providing for the mandatory allocation of crude oil . . . ." All regulatory action which is the subject matter of this suit was taken pursuant to that directive by the FEA or its predecessor, the Federal Energy Office (FEO).

6. On December 11, 1973, the FEO issued a proposed regulation providing for the mandatory allocation of crude oil and invited public comments on that proposal. 38 F. R. 34414 (Dec. 13, 1973).

7. The FEO's published proposal would have permitted crude oil producers, upon notice to the existing purchaser at least 30 days prior to the commencement of an allocation quarter, to sell their crude oil to purchasers of their own choice, including Basin or any other new market-entrant. 10 C. F. R. § 200.29(b) 38 F. R. 34421.

8. In response to the invitation mentioned in paragraph 6 above, the FEO received and considered numerous comments on the proposed regulation.

9. After taking such comments into account, on December 27, 1973, the FEO issued the initial regulations providing for mandatory allocation of crude oil. 39 F. R. 744 (Jan. 2, 1974). As issued, those regulations permitted crude oil producers, upon notice to the existing purchaser at least 30 days prior to the commencement of an allocation quarter, to sell their crude oil to purchasers of their own choice, including Basin or any other new market-entrant. 10 C. F. R. §200.29-(i), 39 F. R. 752.

10. Thereafter, on January 14, 1974, without any published notice of intention to do so, the FEO issued a new regulation (also referred to as the "freeze rule") which, with limited exception froze domestic crude oil supplier/purchaser relationships as of December 1, 1973, for the duration of the mandatory crude oil allocation program. 10 C. F. R. §211.64, 39 F. R. 1924 at 1939 (Jan. 15, 1974).

11. As applied to Basin, the freeze rule issued on January 14, 1974, immediately deprived it of approximately 75% of the crude oil purchases previously committed to it and, with insignificant exceptions, denied it access to all other sources of domestic crude oil.

12. Under the freeze rule issued on January 14, 1974, the historical crude oil marketer was accorded the exclusive right to purchase the cheaper price-controlled oil (unless it declined to meet a higher lawful offer made to its supplier by another marketer), and a newcomer was in effect relegated to limited sources of higher-priced oil not subjected to price control.

13. The regulation issued January 14, 1974, had the effect of freezing newcomers to the crude oil marketing business out of access to sources of supply. The FEO realized this but was willing to adopt a regulation with such an effect because it assumed it was dealing with a very temporary regulatory program that would not last more than six months. Such assumption has proved to be false.

14. On April 22, 1975, the FEA issued proposed amendments to the freeze rule for the purpose of allowing new entry into the crude oil marketing business and promoting greater competition in it. 40 F. R. 18182 (April 25, 1975).

15. On October 6, 1975, after hearing and based upon evidence of record before it, that Court entered its PreliminaryInjunction in favor of the Plaintiff and against the Defendants in this cause. Thereafter, Defendants appealed this Court's order to the Temporary Emergency Court of Appeals of the United States (TECA).

16. On October 16, 1975, approximately six months after its amendment proposal of April 22, 1975, and while the appeal before TECA was still pending, the FEA issued a public notice stating.

> "An additional amendment proposed in the April 22, 1975 notice would have effectively allowed the substitution of new reseller of crude oil for the present reseller under certain conditions without the latter's consent. FEA has not yet made a final determination as to whether or in what form this proposed amendment should be issued, and

accordingly is delaying final action on this proposed amendment until its analysis of the issue has been completed." 40 F. R. 49297 (Oct. 22, 1975)

17. On November 18, 1975, the FEA issued an amendment to the freeze rule. 40 F. R. 54422 (Nov. 24, 1975). The amended rule denied a new entrant to the domestic crude oil marketing business all access to supplies of domestic crude oil with the following limited exceptions:

(a) Stripper well oil;

(b) Oil from new producing wells which had not been previously sold to any other purchaser;

(c) New and released oil from a previously productive property if the historical marketer declined to meet a higher lawful offer made to the seller by the new entrant;

(d) Any oil if the refinery customers of the historical marketer consented to the substitution of the new entrant.

18. Under the November 18, 1975, amendment to the freeze rule, a new entrant to the crude oil marketing business had access to the cheaper price-controlled oil only if its competitors or its competitors' customers did not veto its attempts. A newcomer could purchase new or released oil from existing fields only if its competitor—the existing purchaser—declined to meet its higher bid. And a newcomer could purchase old oil only if the refinery customers of its competitors consented to its substitution.

19. On February 12, 1976, in response to the Energy Policy and Conservation Act (Pub. L. 94-163), the FEA issued further amendments to the freeze rule. 41 F. R. 7386 (Feb. 18, 1976). These amendments changed the freeze date from December 1, 1973, to January 1, 1976. In addition, these amendments further restricted the sources of domestic crude oil to which a new entrant to the crude oil marketing business could have access.

20. The amended freeze rule of February 12, 1976, denied a new entrant to the domestic crude oil marketing business all access to supplies of domestic crude oil with the following limited exceptions:

(a) Oil from new producing wells which had not been previously sold to any other purchaser;

(b) Stripper well oil and new oil from a previously productive property if the historical marketer declined to meet a higher lawful offer made to the seller by the new entrant;

(c) Any oil if the refinery customers of the historical marketer consented to the substitution of the new entrant.

21. In issuing its February 12, 1976, amendments to the freeze rule, the FEA issued a public notice stating:

"FEA recognizes the problems that may be created by this rule and therefore is making it effective only for a period of 90 days (i.e., through May 11, 1976)." 41 F. R. 7386 (Feb. 18, 1976).

22. On April 6, 1976, TECA issued its opinion in

the appeal from this Court's Preliminary Injunction of October 6, 1975, and that opinion is reported at 534 F. 2d 324.

23. On April 16, 1976, the FEA issued proposed amendments to the freeze rule and gave notice of a public hearing to be held May 6-7, 1976.

24. On May 12, 1976, the FEA extended the freeze rule, as previously amended on February 12, 1976, for another thirty days—i.e., until June 10, 1976. 41 F. R. 20158 (May 17, 1976).

25. On June 11, 1976, the FEA issued its latest amendment to the freeze rule. 41 F. R. 24338 (June 16, 1976). The terms of that amendment were substantially different from the proposal previously issued by the FEA on April 16, 1976.

26. Under the present provisions of the freeze rule, as last amended on June 11, 1976, new entrants to the domestic crude oil marketing industry are denied all access to supply of domestic crude oil with the following limited exceptions:

(a) Stripper well oil, provided it is purchased for resale to a "small refiner";

(b) Oil from new producing wells which has not been previously sold to any other purchaser;

(c) Any oil previously sold by a producer below the ceiling price, if the historical marketer declines to meet a higher lawful offer made to the producer by the new entrant;

(d) Any oil if (i) the refinery customers of the historical marketer consent to the substitution of the new entrant, or (ii) in the absence of a particular refiner's consent, if the new entrant offers to supply the same volume of oil to the refiner at a price which includes transportation and handling charges less than or equal to those of the historical marketer.

27. The freeze rule, as last amended by the FEA on June 11, 1976, and as in effect at all times since January 14, 1974, has effectively eliminated relatively recent comers—including Basin—from the crude oil marketing business.

28. Basin has had a marginal economic existence from and after January 14, 1974.

29. This marginal existence is the direct result of the impact of the freeze rule and not the result of Basin's failure to charge its customers the maximum price to which it may have been entitled under the applicable price-control regulations.

30. **The relationships, pressures, and economic interests in the oil industry are such as to have made the various amendments to the freeze rule insignificant in improving the access of new market-entrants to crude oil supplies.** Basin has attempted in good faith to purchase crude oil supplies and to compete as a newcomer to the crude oil marketing business under each of such amendments, and all such attempts have been futile because of the obstacles built into the regulation and beyond the reasonable control of Basin.

31. Neither the November 18, 1975, amendment to the freeze rule permitting a new entrant to buy from a

producer a quantity of crude oil that the producer has been selling to another marketer if the existing refiner consents to the substitution; nor the February 12, 1976, amendment to the freeze rule allowing a new entrant to become a purchaser in a first sale of crude oil from a new oil producing property; nor the June 11, 1976, amendment to the freeze rule, allowing a new entrant to buy from a producer a quantity of crude oil that the producer has been selling to another marketer if the new entrant will supply the same volume of oil to the existing refiner at a price which meets or beats the actual transportation and handling charges of the existing marketer—**none of these amendments to the freeze rule have meaningfully broadened Basin's access to crude oil supplies.**

32. **If the freeze rule as presently constituted remains in effect, in all likelihood, Basin will be forced out of business, and the entry of any newcomer into the crude oil marketing business will be effectively foreclosed.**

33. To assure adequate supplies of crude oil to small independent refiners, the FEA presently has in effect a regulatory program (the "buy-sell" program) which enables it to provide for an equitable allocation of crude oil among all domestic refineries.

34. Although it would entail some administrative burden, the FEA can make reasonable modifications in its buy-sell program to avoid any unwarranted deprivations upon small independent refiners which might be caused by the abolition of the freeze rule.

35. The FEA can correct any problem of "layering" which might result from abolition of the freeze rule by promulgating regulations which attack the problem directly.

Conclusions of Law

1. This Court has jurisdiction of the subject matter of this action. 15 U. S. C. § 754(a)(1)(A); section 211(a) of the Economic Stabilization Act of 1970, set out as a note under 12 U. S. C. § 1904.

2. 10 C. F. R. § 211.63, as amended on June 11, 1976, was issued by the FEA under the authority of 15 U. S. C § 735(a). **By congressional mandate, 10 C. F. R. § 211.63 must: (a) foster competition in all segments of the industry, (b) provide for the equitable distribution of crude oil and of petroleum products within each segment of the industry,** and (c) minimize inflexibility and interference with market mechanisms. 15 U. S. C. § 753(b)(1).

3. Because 10 C. F. R. § 211.63 fails to: (a) foster competition in all segments of the industry, (b) provide for the equitable distribution of crude oil and of petroleum products within each segment of the industry, and (c) minimize inflexibility and interference with market mechanisms, it contravenes the underlying policies of the Emergency Petroleum Allocation Act.

4. **There are no compelling circumstances justifying the effect of 10 C. F. R. § 211.63 in effectively eliminating relatively recent comers—including Basin—from the crude oil marketing business.** Neither the problem of "layering" nor the problem of assuring

small independent refiners adequate supplies of crude oil constitute compelling circumstances justifying the existence of 10 C. F. R. § 211.63.

5. 10 C. F. R. § 211.63 is **arbitrary, capricious, and an abuse of discretion in that it effectively eliminates recent comers from the crude oil marketing industry without any compelling circumstances to do so and in that it does not, as to such new market entrants, constitute an allocation of crude oil but is rather a total denial of access to crude oil to them and is unlawfully discriminatory as to the Plaintiff and any other new market entrant.**

It is therefore Ordered, Adjudged, and Decreed that Plaintiff have and it is hereby granted the following relief:

1. It is judicially declared that 10 C. F. R. § 211.63 as it now exists:

(a) effectively eliminates recent comers from the domestic crude oil marketing business and that there are **no compelling circumstances** to justify that elimination, and

(b) contravenes the Congressional mandate set forth in 15 U. S. C. § 753(b)(1), and

(c) does not constitute an allocation of crude oil as to new entrants to the crude oil marketing business, but rather is a total denial of access to crude oil to them, and

(d) is **arbitrary, capricious, and an abuse of discretion, and**

(e) is therefore invalid, unlawful, null and void.

2. The Defendants should be, and they hereby are, **permanently enjoined from enforcing or executing 10 C. F. R. § 211.63 against the Plaintiff.**

3. Nothing herein contained shall prohibit the FEA:

(a) From further amending its regulations so as to require any producer of crude oil, to the extent necessary, to sell any particular crude oil on reasonable terms and conditions to any particular refinery, where such an amendment is necessary to provide an equitable supply of crude oil for that refinery.

(b) From further amending its regulations to prohibit any change of historical purchasers under circumstances which the FEA finds would insert a purchaser in addition to the number then existing between the original producer and the ultimate refiner in such a way as to increase the price at which such crude oil can be lawfully sold to the ultimate refiner, or to take such other action, nondiscriminatory as among resellers, to prevent price increases by means of chain resales commonly referred to as "layering."

(c) From further amending its regulations so as to minimize the administrative inconvenience, if any, resulting from this order or otherwise carry out the statutory responsibilities of the FEA; provided that no such amendment shall be made which would effectively eliminate newcomers from entering into the crude oil marketing business.

IT IS ACCORDINGLY, SO ORDERED this 22nd day of October, 1976.

This action came on for trial before the Court, Honorable D. W. Suttle, District Judge, presiding, and the issues having been duly tried and a decision having been duly rendered,

IT IS ORDERED and ADJUDGED

that 10 C. F. R. § 211.63 as it now exists: (a) effectively eliminates recent comers from the domestic crude oil marketing business and there are no compelling circumstances to justify that elimination, and (b) contravenes the Congressional mandate set forth in 15 U. S. C. § 753(b)(1), and (c) as to new entrants to the crude oil marketing business, does not constitute an allocation of crude oil but rather is a total denial of access to crude oil to them, and (d) is arbitrary, capricious, and an abuse of discretion, and (e) is therefore invalid, unlawful, null and void.

IT IS FURTHER ORDERED and ADJUDGED

that the Defendants should be, and they hereby are, permanently enjoined from enforcing or executing 10 C. F. R. § 211.63 against the Plaintiff.

Dated at San Antonio, Texas, this 22nd day of October, 1976.

Basin, Inc. v. Federal Energy Administration, et al., U. S. Temporary Emergency Court of Appeals, Dkt. No. 5-21, March 7, 1977.

JOHNSON, Judge.

This case involves the validity of 10 C. F. R. §211.63, a regulation of the Federal Energy Administration (FEA hereinafter) commonly known as the "supplier-purchaser freeze" rule. In 1973, Congress passed the Emergency Petroleum Allocation Act[1] in response to problems that it perceived in the petroleum industry. A notable cause of these difficulties was the Arab oil embargo. The Act required FEA to allocate the distribution of domestically produced crude oil in pursuance of certain stated objectives, and Section 211.63 was promulgated by FEA for this purpose.

Section 211.63 has the effect, with the exceptions discussed later, of locking or freezing into place the supplier-purchaser relationships that existed before the freeze date of December 1, 1973. If a producer of crude oil had been supplying a certain reseller, or if the reseller had been supplying a certain refiner, then the "freeze" rule required that they continue to do so. A related, though smaller, program is the refiner regulatory ("buy-sell") program. It is designed to protect small independent refiners from large integrated ones which own their sources of supply. Under it, the independent refiners may compel the integrated companies

[1]15 U. S. C. § 751 *et seq.*, as amended.

to sell them petroleum, the exact quantity being determined by regulations.[2]

Plaintiff-appellee Basin, Inc., is a reseller of petroleum. It buys from domestic producers of oil and resells the same oil to refiners. The company was founded only two months before the Allocation Act became law. It had made arrangements for the purchase of a substantial quantity of petroleum, but **it was deprived of about seventy-five percent of that supply by the supplier-purchaser freeze.** Since that time, an apparently growing and profitable business has undergone economic stagnation.

Basin sought administrative relief for its problems, particularly a change in the FEA regulations. Some modifications were made, but Basin considered them to be unsatisfactory. It therefore instituted a suit in the Western District of Texas. The district court entered a preliminary injunction against FEA, based on doubt that the Allocation Act could abrogate contracts entered into before the freeze date. However, this Court found that particular issue already to have been settled in the agency's favor. It remanded for consideration of the extent to which Basin was foreclosed from the market by the contested regulation, and FEA's justification for any such result. *Basin, Inc. v. Federal Energy Administration*, 534 F. 2d 324 (Em. App. 1976).

Before trial, the Independent Refiners Association of America (IRAA) moved to intervene. The district court denied the motion and refused to permit IRAA's

[2]See 10 C. F. R. § 211.65.

counsel to participate in the trial. Cases 5-20 and 5-22 involve appeals by IRAA from this denial of intervention. Because of this Court's disposition of the principal case, 5-21, it is unnecessary to reach the intervention issue.[3]

At the conclusion of the trial in which Basin and FEA participated, **the district court found that a continuation of the freeze rule would drive Basin out of business and effectively foreclose any new entrants into the crude oil marketing field.** It found the exceptions to the freeze rule to be "insignificant" and said that any hardship caused by the abolition of the rule could be compensated for under the buy-sell program. It further concluded that the regulation failed to advance three of the underlying policies stated in the Allocation Act, and thus that it contravened the statutory mandate. Because of these factors, **the supplier-purchaser freeze rule was found to be arbitrary, capricious, and an abuse of discretion,** and its enforcement against Basin was enjoined. From this judgment, FEA appeals.

Of critical importance to this case is what standard the trial court should have applied in evaluating the FEA's regulation. **This Court concludes that the regulation should have been upheld if it had any rational basis to support it.** It is true that reviewing courts should not simply "rubber-stamp" the actions of administrative agencies. *NLRB v. Brown*, 380 U. S. 278,

[3]Mr. Dryer, IRAA's counsel, represented to the Court in oral argument that IRAA would be satisfied with a reversal of the district court in 5-21, without consideration of the intervention issue. As this Court does reverse the district court in the main case, the intervention issue is moot and therefore it is not necessary to consider 5-20 and 5-22.

291-292 (1965); see *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U. S. 726 (1973); *Volkswagenwerk v. Federal Maritime Commission*, 390 U. S. 261 (1968). However, the decisions of administrative agencies are not lightly disregarded. *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U. S. 94 (1973). To sustain an agency's statutory interpretation, it is not necessary to "find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Udall v. Tallman*, 380 U. S. 1, 16 (1965). The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." *Unemployment Compensation Commission of Alaska v. Aragon*, 329 U. S. 143, 154 (1946); *NLRB v. Hearst Publications*, 322 U. S. 111, 131 (1944). The attitude of this Court toward judicial review of economic controls has been along these lines. "It is a well settled principle that the courts place great weight on the interpretations given to statutes and regulations by those agencies charged with the responsibility of administering them." *Pacific Coast Meat Jobbers Ass'n, Inc. v. Cost of Living Council*, 481 F. 2d 1388, 1392 (Em. App. 1973). *See University of Southern California v. Cost of Living Council*, 472 F. 2d 1065, 1068-1069, (Em. App. 1972), *cert. den.* 410 U. S. 928.

Perhaps the decision most relevant to this case is

Condor Operating Co. v. Sawhill, 514 F. 2d 351 (Em. App. 1975), *cert. den.* 421 U. S. 976. There, Section 211.63 was challenged by an oil producer. This Court stated, "Where the obvious intent of Congress is to give the President and his delegates broad power to do what reasonably is necessary by a recognized emergency, and regulations are fashioned to implement the Congressional mandate, the court should not interfere with the prerogative of the agency to select the remedy which for rational reasons is deemed most appropriate." *Id.* at 359. See *Pasco, Inc. v. Federal Energy Administration*, 525 F. 2d 1391 (Em. App. 1975); *Pacific Coast Meat Jobbers Ass'n, Inc. v. Cost of Living Council, supra; Reeves v. Simon*, 507 F. 2d 455 (Em. App. 1974), *cert. den.*, 420 U. S. 991; *Mandel v. Simon*, 493 F. 2d 1239 (Em. App. 1974); *University of Southern California v. Cost of Living Council, supra.* This standard is the proper one in the present case.[4]

The problem remains whether the questioned regulation meets this rationality standard. The Emergency Petroleum Allocation Act specifies nine objectives

[4]There appears to have been some confusion on the part of appellee with regard to a statement in the opinion of this Court when this case was here before. That opinion stated, "any governmental action that will effectively eliminate relatively recent comers from an industry calls for critical scrutiny and can be juestfied only by a clear showing of compelling circumstances." *Basin, Inc. v. Federal Energy Administration*, 534 F. 2d 324, (Em. App. 1976). However, this dictum was made without the benefit of a full justification by FEA of its actions, and certainly cannot be interpreted as calling for a change in the standard of review of administrative action. In fact, the prior opinion emphasized that the case was being remanded for consideration of the *reasonableness* of FEA's action. *Id.* at 327.

which the FEA is to pursue in its regulations.[8] However, the objectives are broad and the FEA must be afforded substantial leeway in attempting to attain them. Each stated goal cannot be raised to the status of a mandatory requirement for each regulation, as the legislative history clearly shows. The House committee report states that the drafters were "careful

[8](b) (1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for—

(A) protection of public health (including the protection of pharmaceuticals), safety and welfare (including maintenance of residential heating, such as individual homes, apartments and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintanance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbrand independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of—

(i) fuels, and

(ii) minerals essential to the requirements of the United States, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

to provide the President with adequate flexibility so that he is not straight jacketed into accomplishing these objectives in instances where it would be inimicable to the public interest." H. R. Rep. No. 93-531, 93d Cong., 1st Sess. (1973), 1973 *U. S. Code Cong. & Ad. News*, 2590. The Conference Report says that it may be impossible to satisfy one objective without sacrificing the accomplishment of another. Conference Report 93-628, 93d Con. 1st Sess. (1973) 1973 *U. S. Code Cong. & Ad. News*, 2688. Further, the statute itself says that the stated objectives are to be pursued "to the maximum extent *practicable*." (Emphasis added). This indicates that a considerable degree of flexibility was intended by Congress and was incorporated into the Act. *Pasco, Inc. v. Federal Energy Administration*, 525 F. 2d 1391 (Em. App. 975).

In *Condor Operating Co. v. Sawhill*, *supra*, this Court held Section 211.63 to be a "rational exercise" of the power conferred by Congress. The regulation has been amended since that time, but Basin cannot demonstrate how the amendments make it less rational. Rather, it tries to distinguish *Condor* from this case principally on the basis of the district court's finding that new entrants, such as Basin, are barred by the regulation from the crude oil marketing business. This factor, it contends, renders an otherwise rational regulation irrational.

Assuming that new entrants are barred the regulation may still be viewed as a rational attempt to implement the congressional mandate. The primary aim of the Emergency Petroleum Allocation Act is to deal with "existing or imminent shortages and dislo-

cations in the national distribution system." Conference Report 93-628, 93d Cong. 1st Sess. (1973) 1973 *U. S. Code Cong. & Ad. News*, 2688. And Congress was particularly concerned with protecting small, independent refiners and marketers from large integrated companies. It is uncontested that the supplier-purchaser rule stabilizes the distribution system and greatly helps to protect the sources of supply of the small, independent refiners. That the trade association[6] of these refiners attempted to intervene in this case to save the regulation supports such a conclusion. Under these circumstances, it is rational for FEA to conclude that a measure which accomplishes one of the major goals of the Act is of such overriding importance that it is consistent with the statutory mandate, even if it does have the undesirable side effect of foreclosing the entry of new resellers into the industry.

The district court found that Section 211.63 failed to effectuate three of the stated purposes of the Allocation Act. It is said that the freeze rule failed to (a) foster competition in all segments of the industry, (b) provide for an equitable distribution of oil, and (c) minimize inflexibility and interference with market mechanisms. As indicated above, the FEA must be given considerable leeway in pursuing these objectives, and it can rationally argue that it is in fact effectuating those singled out by the district court as well as possible. The freeze rule is failing to foster competition in that it makes it more difficult for new

[6]Independent Refiners Association of America, appellant in 5-20 and 5-22.

entrants to come into the reselling business, but the freeze is encouraging competition greatly in that it protects the small independent refiners from the large integrated companies. Without this rule, or something like it, there is considerable reason to believe that the integrated companies would severely restrict the ability of the independent refiners to compete. Conference Report, 93-628, *supra*. Thus it is rational for FEA to conclude that the freeze rule, on balance, promotes competition. Whether the rule causes an equitable distribution of petroleum depends in great part on how the term "equitable" is defined. The legislative history indicates that Congress intended for refiners to receive amounts equal to what they had historically received, if "practicable." Conference Report, 93-628, *supra*. This suggests that Congress considered it "equitable" for the refiners to have their sources of supply protected, which is what the freeze rule does. The rule therefore contributes to an "equitable" distribution of petroleum to a considerable extent, even if the share that Basin gets is not considered to be "equitable." It should be added that, when dealing with terms as broad and subject to conflicting interpretations as "equitable" is, deference to the agency charged by Congress with making that interpretation is especially appropriate. The district court found that the regulation did not minimize inflexibility and interference with the market mechanisms as the statute calls for. This essentially is true, because a mandatory allocation is by its nature an interference with the market mechanism. But Congress required a mandatory allocation. Further,

the only alternative to the freeze rule suggested by either Basin or the district court was an extension of the buy-sell program. Adopting the buy-sell program would also involve the government in directing where oil should go, and thus could hardly be considered an improvement over the freeze rule in that regard. At least the freeze rule adopts the patterns that the free market has followed in the past, even if it does not permit the market to operate unhindered today. It is therefore clear that even in the three specific instances where the district court found that the freeze rule was not effectuating the statutory mandate, FEA has rational reasons for believing that it is in fact doing so. And as long as those reasons are rational, the regulation must be upheld.

Basin claims that the small, independent refiners can be protected just as well by an extension of the buy-sell program as by a continuation of the freeze rule. The district court so found. However, it is quite reasonable for FEA to conclude otherwise. Expanding the buy-sell program, as suggested, would tremendously increase the number of transactions which FEA would have to conduct. Whenever an independent refiner needed crude oil, FEA would have to determine who was the nearest supplier with the right type and quantity of crude oil, and compel him to sell the needy refiner. Thus, a government agency would have to make innumerable decisions as to the distribution of petroleum which in the past were made by the market mechanism. It is quite arguable that an agency could not do nearly as effective a job as the freeze rule does. Michael Paige, assistant general counsel for allocation

for FEA, testified that it is "very difficult for a Federal agency to make judgments as to how to get crude oil to a needy smaller independent refiner." He said that there were problems under the buy-sell program at its present size, and that administration of a much expanded program would be "incredibly difficult." In fact, he found it "unbelievable" that any allocation plan other than the freeze could adequately do the job. Rather than trying to develop a complex new distribution pattern by agency fiat, FEA has frozen into place one that worked. Paige testified that "allocation as of a freeze date is a lot more effective provision than any administrative assignment procedure that we could ever manage." It is certainly reasonable to conclude that freezing into place a properly functioning system is more efficient than having a government agency design a vast new one. And deference to an agency's judgment is especially appropriate when the issue is the ability of that same agency to perform certain tasks. Difficulties in administering the expanded buy-sell program involve more than simply irritating bureaucrats. To the extent the FEA fails to efficiently allocate petroleum, the shortages and dislocations which the Allocation Act was intended to prevent will be increased. In sum, FEA has rational reasons for concluding that no allocation program can protect the small independent refiners to the same degree as the supplier-purchaser freeze rule, and that it is therefore the approach which best achieves the congressional purpose.

It is true that the district court found that the buy-sell program could do just as effective a job of pro-

tecting the small independent refiners as the current freeze rule, **and we do not specifically overturn that finding.**[7] However, the issue is not what a court believes would be the most effective course. The issue is whether the course that FEA has adopted is "for rational reasons . . . deemed most appropriate." *Condor Operating Co. v. Sawhill, supra,* at 359. The district court does not appear to have measured Section 211.63 by this rationality standard. In any case, a correct application of that standard requires that the regulation be upheld.

Also supporting the reasonableness of the freeze rule are the seemingly substantial exceptions to it. All oil produced by stripper oil wells, twelve to fifteen percent of domestic production, is subject to no restraints, provided it is purchased for resale to a small refiner. All oil from new oil wells—wells which have not produced before—are free from restraint. If a new reseller fails to meet the offer, then the producer may switch customers. Of course, no offer may exceed the legal price ceiling. Another exception is that a substitution of one reseller for another is permitted if the refiner who has been receiving the oil agrees to the substitution. And finally, one reseller may replace another if he agrees to supply the same refiner with the oil and charge no more for transportation and handling. In sum, if a seller can pay the producer more or charge the refiner less, or if the refiner has no objection to the supplier's being changed, then

[7]The Court is constrained to note, however, that Michael Paige, an official experienced in administering the allocation program, testified to the contrary, and Basin has directed the Court to no evidence which contradicts his testimony.

Basin and other new resellers may replace old resellers. They may also obtain new oil and oil from stripper wells. This would seem to open up a lot of potential areas for new resellers. **We do not overturn the district court's finding that new entrants to the business are foreclosed.** But the exceptions to the freeze rule demonstrate an attempt by FEA to aid the new resellers, without harming the refiners. This further supports the reasonableness of FEA's approach.

Finally, Basin argues that Section 211.63 constitutes a taking of property for public purposes without just compensation, in violation of the Fifth Amendment. The district court made no such findings. In fact, the only effect that the regulation had on Basin was the incidental one of preventing it from making a profit in a very narrow area of the petroleum industry—the purchasing of domestic petroleum from independent producers and the reselling of it to independent refiners. **Basin may engage in any other lawful activity.** The government is not required to create or preserve business conditions which are favorable to a corporation in order to avoid taking property for public use. This Court has stated that "the Fifth Amendment prohibitions against the taking of property for public use without just compensation or due process of law refers only to direct appropriation and not to consequential injuries resulting from the exercise of lawful regulations." *Condor Operating Co. v. Sawhill, supra,* at 361. Basin's contention is without merit.

In upholding Section 211.63, this Court expresses no opinion as to the wisdom or efficacy of the questioned regulation. The judiciary does not comprise a higher administrative board charged with determining what agency action would be in the best interest of the nation. In cases such as this one, once it is determined that a contested regulation is a rational attempt to effectuate the congressional policy, the inquiry must be closed.

Accordingly, the judgment of the district court is REVERSED.